

**CITY OF BAINBRIDGE ISLAND, WASHINGTON
HEARING EXAMINER**

CODE INTERPRETATION APPEAL DECISION

Proceeding: Administrative Code Interpretation Appeal of Margaret Dufresne
File number: PLN50287 ADM
Appellants: Margaret Dufresne
Location: 11131 and 11143 Rolling Bay Walk

FINDINGS OF FACT

1. Margaret Dufresne owns property on a slope overlooking Puget Sound, a shoreline regulated by the City's Shoreline Management Program (SMP). The shoreline slopes in this general vicinity have a history of landslides, including major events in 1996-97 that destroyed and damaged homes and other properties along the slope toe, killing a family of four and forcing closure of a public road. In 2004 the City issued a shoreline conditional use permit (SCUP) to Michael Fleck, the owner of several of the affected properties (including the one now owned by Ms. Dufresne), for the construction of a parallel set of cross-slope soldier pile catchment and retaining walls designed to prevent upper slope slides from further impacting downslope residential sites along the shoreline. As described in the City's SCUP decision, Mr. Fleck's purpose in constructing the walls was to "provide protection for existing and rebuilt houses from slope failures."
2. Mr. Fleck's catchment and retaining walls were completed in 2008 but, despite issuance of a now long expired building permit for reconstruction, no residence was ever built by Mr. Fleck on the lot now owned by Ms. Dufresne, nor has Ms. Dufresne herself yet applied for a residential building permit. Her recent conversations with the City on the permitting topic have reached an impasse. The City states that it will not approve residential construction on her site without issuance of a shoreline variance, while Ms. Dufresne argues that no variance should be required, with her attorney Dennis Reynolds offering various legal theories in support of her position.
3. Ms. Dufresne has pursued the City's code interpretation process as an avenue for supporting her contention that no shoreline variance is required for building a house on her lot. BIMC 2.16.020.D.3 provides as follows:

Any person may request an interpretation of the zoning code, shoreline master program, or subdivision regulations. The director of planning and community development may issue interpretations of the zoning code, shoreline master program, or subdivision regulations as needed, and shall post issued interpretations on the city website.

4. On October 14, 2015, Mr. Reynolds filed a request for a code interpretation with the City's Director of Planning and Community Development. The interpretation request mainly focused on the question of whether Ms Dufresne's proposed building site should be denominated a regulated "marine bluff" under the City's SMP and the resultant permitting implications of such a classification. The Planning Director responded in a letter dated November 6, 2015, asserting that Ms. Dufresne's proposed site is in fact located on a regulated marine bluff, confirming staff's earlier position that no development is permitted on such an entity, and stating that the property would not qualify for the regulatory treatment requested by the appellant under either the special geotechnical review or encumbered lot provisions of the SMP. The City's position has consistently been that residential construction on Ms. Dufresne's proposed site can in fact be authorized under a shoreline variance if the applicable review standards are met, a stance confirmed both at the hearing and within its post-hearing brief.
5. On November 18, 2015, Ms. Dufresne appealed the Planning Director's code interpretation decision to the Hearing Examiner pursuant to BIMC 2.16.020.P.1. A public hearing on the appeal was held on February 17, 2016. Post-hearing legal briefing was requested from the parties, with particular emphasis to be placed on two questions: the appropriate scope of a code interpretation conducted under the broad terms of BIMC 2.16.020.D.3, taking into account the desire to provide meaningful assistance to the requesting party while not usurping or circumventing the City's permitting process, and the application of the rules of statutory construction to the specific code provisions under review.
6. Ms. Dufresne's proposed residential building location is a rectangular site measuring 118 feet across the slope by 50 feet downslope. It lies northeast of and downslope from the lower of the two walls installed by Mr. Fleck and encompasses Rolling Bay Walk at the bottom of the slope adjacent to the Sound. As confirmed by Mr. Reynolds' most recent brief, "the proposed home will be located approximately 65 feet from the shore." A February 14, 2016, report prepared by the appellant's geotechnical consultant, Vincent Perrone, described the building site as having about a 50% slope gradient, which over a 50 foot width would translate to a 25 foot drop in elevation.
7. As observed both within the Examiner's hearing remarks and the subsequent briefing notice, BIMC 2.16.020.D.3 by its literal terms provides a rather open-ended interpretation opportunity that needs to be properly delimited to provide useful guidance to the public as well as due respect for the integrity of the permitting process. For example, taken by itself the subsection appears to suggest that any member of the public might request in the abstract a code interpretation completely unrelated to a specific parcel. If true, this could result in an exercise falling short of expectations because, absent a specific parcel and a requesting party with a property interest therein, the resultant interpretation would carry no legal effect. BIMC 2.16.020.D.3 is located within a section otherwise devoted entirely to defining the rights of permit applicants. Perhaps a more sensible understanding of the procedure would be that code interpretation requests should be limited to circumstances where a valid permit application could feasibly be the outcome.

8. These matters of scope are consequential because Mr. Reynolds' appeal and briefing documents raise issues that seek to push the envelope regarding what may be attainable through such a procedure. The Examiner's view is that the purview of the City's code interpretation process should be generally defined as follows:

- The primary purpose and usefulness of the code interpretation process is to allow a prospective applicant to receive guidance on the meaning of key regulatory terms that potentially affect a contemplated land use proposal. This can be particularly helpful where alternative regulatory paths appear to be available involving differing levels of difficulty or cost.
- The code interpretation procedure should diligently abstain from the temptation to substitute itself for the City's permitting process. A code interpretation can clarify the meaning of key permitting terms but should avoid attempts to conclusively apply such terms within a specific regulatory context.
- Code interpretation is by definition not a fact-finding process. While inevitably certain factual assumptions may need to be made to ascertain which specific code provisions are at issue, such assumptions are provisional only and do not preclude different factual conclusions from being reached within a full permitting review process.
- The code interpretation appeal procedure is limited to reviewing the issues raised before the Planning Director within the initial request. But resolution of a code interpretation request may require consideration of a chain of interconnected regulatory provisions. Parties cannot reasonably object that a code interpretation procedure delves into other interpretive issues beyond those originally identified if such expansion is logically required to resolve the issues raised. Conversely, introducing new interpretive issues at the hearing level is unwarranted if the original request can be adequately addressed without such expansion. And by extension, regulatory questions totally unrelated to any issues of code interpretation are clearly beyond the limited jurisdiction of this procedure and should not be addressed at all.
- The code interpretation process is subject to the normal rules of statutory construction. The foundational objective is always to give effect to the legislative intent underlying the regulation. No exercise in the construction of regulatory terms is justified where regulatory provisions are clear on their face.
- The code interpretation procedure does not constitute some sort of ombudsman process wherein perceived defects or injustices in the City's regulatory system can be bypassed or reformed. The proper remedy for bad ordinances and plans is to petition the legislative body to change them.

9. Turning now to the specific issues raised by Ms. Dufresne's code interpretation appeal, her consultants' hearing testimony mostly consisted of recounting the process for construction of Mr. Fleck's walls and attesting to the adequacy of the geotechnical investigations that supported issuance of the 2004 SCUP. The suggestion was that all the necessary technical analysis for construction of a house on the slope has been done, that residential construction of the type proposed by Ms. Dufresne was contemplated by the SCUP, and therefore that the building permit application now being anticipated by Ms. Dufresne should be considered vested to the shoreline regulations in effect in 2004

when the SCUP was issued, not the more stringent provisions of the City's newly adopted SMP.

10. Whatever its ultimate merit, this argument essentially seeks a ruling based on the state's vesting laws. As such, it does not involve an interpretation of the City's “*zoning code, shoreline master program, or subdivision regulations*” authorized by BIMC 2.16.020.D.3. It thus lies beyond the jurisdictional mandate of a code interpretation proceeding.

11. Most of the actual code interpretation issues raised in this appeal relate to the SMP's use of terminology relating to a “marine bluff” and the implications of such terminology for the City's shoreline critical areas and development regulations. The City's SMP is itself a component of its Comprehensive Plan that is to be manifested in the regulations adopted within Chapter 16.12 of the Municipal Code. SMP Section 4.1.5.8(3) provides, subject to listed exceptions, that “[*a*]ll proposed development on the face of a marine bluff or in the required buffer area shall be prohibited.” This same provision appears within the adopted regulations at BIMC 16.12.060.K.4(c)(iii).

12. BIMC 16.12.080, the section devoted to shorelines definitions, states that “*Bluff, marine*” means a high, steep bank or cliff.” Also relating to marine bluffs, BIMC 16.12.060.K.4(c), as part of the shoreline critical areas subsection entitled “Special Reports and Determination of Buffers for Marine Bluffs,” contains the following initial paragraph:

i. Applicants proposing development adjacent to a marine bluff (i.e., slopes greater than 40 percent that exceed a vertical height of 10 feet within the marine shorelines jurisdiction) shall submit a geotechnical engineering report prepared in accordance with the requirements of this master program and the shoreline-specific critical areas regulations contained in this section. In terms of this regulation, “adjacent” means development proposed either within 50 feet from the crest of a marine bluff or within a distance equal to the height of the slope from the crest (measured from the top), whichever is greater.

13. The appellant has offered various arguments relating to the interplay among these provisions. Essentially, two principal questions have been raised. First, there is some potential tension between the general terms of the “marine bluff” definition found in BIMC 16.12.080 (“*high, steep bank or cliff*”) and the more specific reference within BIMC 16.12.060.K.4(c)(i) (“*slopes greater than 40 percent that exceed a vertical height of 10 feet within the marine shorelines jurisdiction*”). The appellant argues that the formal definition in BIMC 16.12.080 should alone control and its undefined terms be given their ordinary dictionary meanings.

14. The City's special counsel, Mr. Haney, argued that the two provisions dealing with the same topic need to be read together as a single whole, *in pari materia*, citing cases in support of this approach. The same outcome is also dictated by a second rule of construction which holds that the more specific of two conflicting provisions should be given preference. See, e.g., *Tunstall v. Bergeson*, 141 Wn.2d. 201, 212 (2000); *In re Brown*, 159 Wn.App. 931, 934 (2011). But in reality the two provisions do not contradict one another and thus are not in actual conflict. BIMC 16.12.060.K.4(c)(i) simply addresses the questions left unanswered by the BIMC 16.12.080 definition – how high (10 foot vertical drop), how steep (greater than 40 percent) and where located (within shorelines jurisdiction).

15. The appellant also attempted to assign independent regulatory status to the word “face” in BIMC 16.12.060.K.4(c)(iii) as used within the term “*the face of a marine bluff*.” Arguments were

made that a disturbed slope surface below the walls could not be a face because it was just “a pile of dirt”; that the intent of the regulation was to protect natural slopes, not those that had already been altered; and that the existence of the previously approved walls precluded denominating the slope a face.

16. None of these contentions finds any basis within the City's adopted ordinances. As defined within BIMC 16.12.080, the purpose of the City's regulations governing geologically hazardous areas is, as the label suggests, not to protect the natural beauty of steep slopes but to avoid construction at dangerous locations where they “*pose a threat to the health and safety of citizens when used as sites for incompatible commercial, residential or industrial development.*” No regulatory distinction is made between natural and artificial slopes because the simple fact of human alteration provides no assurance that safety concerns have been addressed; thus Mr Reynolds' metaphorical “pile of dirt” is indeed subject to regulation as a marine bluff if it is characterized by slopes in excess of 40 percent, exceeds 10 feet in vertical height and lies within shoreline jurisdiction. Absent a contrary regulatory specification or obvious regulatory purpose, there is no basis in either code or logic for regarding the “face” of a marine bluff as anything other than the slope surface.

17. One can imagine a scenario where the existence of Mr. Fleck's walls might impact the regulatory analysis. This could arise here if Ms. Dufresne's building site below the walls existed at a 40 percent slope but the required regulatory 10 foot vertical drop did not occur without taking into account the portion of the property on which the walls are located. But such is not the reality presented by the record. The facts clearly show that the slope below the lower wall by itself meets both the 40 percent slope and the 10 foot drop criteria and lies as well within shorelines jurisdiction. The proposed house site standing alone is thus a regulated marine bluff and the presence of the walls is irrelevant to the analysis, just as, for example, a road would also be irrelevant if present in the same location.

18. In summary, there is no regulatory conflict or disparity between BIMC 16.12.060.K.4(c)(iii) and BIMC 16.12.060.K.4(c)(i). The term “*face of a marine bluff*” used in BIMC 16.12.060.K.4(c)(iii) means any slope surface located within “*slopes greater than 40 percent that exceed a vertical height of 10 feet within the marine shorelines jurisdiction*” as defined in BIMC 16.12.060.K.4(c)(i). Assuming the facts described above, Ms. Dufresne's building site below the walls is clearly subject to regulation as the face of a marine bluff.

19. The appellant also made two further interpretive arguments, both of which are dependent on favorable treatment of her contentions concerning the “marine bluff” issue. BIMC 16.12.030.C.1 authorizes single family residential development to be approved in specified circumstances without a shoreline variance on “*a shoreline property that is significantly encumbered by shoreline or critical area buffers.*” As concluded by staff and upheld within this appeal, as a regulated marine bluff Ms. Dufresne's proposed building site is itself a critical area, not merely part of a critical area buffer. As such the site does not qualify for regulatory consideration as an encumbered lot within the plain terms of BIMC 16.12.030.C.1, which limits relief to property lying within a buffer.

20. Finally, BIMC 16.12.060.K.4(c), quoted above, relates to “*development adjacent to a marine bluff*”, with the term “adjacent” further defined as meaning “*development proposed either within 50 feet from the crest of a marine bluff or within a distance equal to the height of the slope from the crest (measured from the top), whichever is greater.*” This subparagraph specifically relates to a requirement for submitting a geotechnical engineering report and appears within a subsection devoted generally to listing submittal requirements. But the appellant wants to take the provision further, arguing that it should additionally be regarded constituting an implicit development regulation. The idea seems to be

that if there is a submittal requirement described in terms of analyzing development proposed within 50 feet of a marine bluff crest, one is therefore also obligated to imply the existence of a corresponding development regulation.

21. The issue raised by the appellant and briefed by the parties was focused exclusively on the regulatory function of the word “adjacent”, and the contested interpretive issue can be resolved satisfactorily within such framework. The term “*development proposed...within 50 feet from the crest of a marine bluff*” appearing in the second, definitional sentence of BIMC 16.12.060.K.4(c), if taken in isolation, can certainly then be read as referring to a 50-foot radius in all directions, which would include development on the bluff itself. But the primary regulatory term appearing at the beginning of the subparagraph, “*development adjacent to a marine bluff*”, is plainly intended to exclude any development on the critical area itself, the marine bluff.

22. “*Adjacent to a marine bluff*” means next to the regulated bluff but not on it. Thus, reading the subparagraph as a whole, the 50-foot measurement reference must only apply to property outside the critical area. This outcome also comports with logic and common sense. The purpose of regulations governing geologically hazardous areas is, as noted earlier, to protect the public from dangerous slope conditions. Creating some sort of arbitrary 50-foot line across the critical area itself and treating development proposed on one side of the line differently from development proposed on the other side is both illogical and compromises the intended protective function of the geologically hazardous areas regulatory scheme.

CONCLUSIONS

1. A code interpretation appeal is focused on the scope and meaning of adopted regulations and plans. Fact-finding is mandated in such an appeal by the site-specific nature of the regulatory process to the extent necessary to ascertain which regulations should apply at what locations. But the fact-finding contained in this code interpretation procedure is provisional only. It does not collaterally estop or otherwise preclude the City or any property owner in the future from asserting different factual data or conclusions about the presence or absence of property features based on the performance of more complete studies and investigations.

2. As elaborated by the findings above, the code interpretations made by the City's Planning Director in her letter to the appellant's attorney dated November 6, 2015, were correct and are entitled to be upheld on appeal. They are supported by the legislative intent of the City's SMP and, especially, its adopted critical area regulations. The SMP provides to the appellant a feasible regulatory pathway for securing approval for her proposed residential development via the shoreline variance process.

3. In terms of the appeal framework, an appellant carries the burden of proof to demonstrate that the Director's code determination was incorrect; BIMC 2.16.020.P(1)(k) provides that within an administrative review appeal the “*decision of the director shall be accorded substantial weight by the hearing examiner.*” The appellant's burden of proof has not been met here and her code interpretation appeal must be denied.

DECISION

The code interpretation appeal of Margaret Dufresne (PLN50287 ADM) is DENIED.

ORDERED March 16, 2016.

/s/Stafford L. Smith
Stafford L. Smith, Hearing Examiner
City of Bainbridge Island

The exhibit list prepared by the Clerk of the Hearing Examiner's Office is attached.

A party with standing may seek judicial review of this decision by filing a timely suit in Kitsap County Superior Court under the Land Use Petition Act.